Statement by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, June 22, 2016

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

   A. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN: STATUS REPORT BY THE UNITED STATES (WT/DS184/15/ADD.161)

- The United States provided a status report in this dispute on June 9, 2016, in accordance with Article 21.6 of the DSU.

- The United States has addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue.

- With respect to the recommendations and rulings of the DSB that have yet to be addressed, the U.S. Administration will work with the U.S. Congress with respect to appropriate statutory measures that would resolve this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

B. UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT: STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.136)

- The United States provided a status report in this dispute on June 9, 2016, in accordance with Article 21.6 of the DSU.

- The U.S. Administration will continue to confer with the European Union, and to work closely with the U.S. Congress, in order to reach a mutually satisfactory resolution of this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

C. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.99)

- The United States thanks the European Union ("EU") for its status report and its statement today.

- As the United States has noted repeatedly at past meetings of the DSB, EU measures affecting the approval and marketing of biotech products remain of substantial concern to the United States. The situation is only getting worse as the EU continues to delay pending approvals. These delays are having a dramatic impact on trade.

- For years, the delays have been restricting U.S. exports of key agricultural products to the EU, including corn. And increasingly this year, U.S. soybean exports are being negatively affected.

- As we noted at the April and May DSB meetings, the United States has serious concerns with the EU's significant delay in approving the applications of three varieties of biotech soybeans. These varieties are critical for U.S. farmers because they include important technologies that promote weed control, and the varieties are grown across the United States.

- The EU's scientific body concluded extensive scientific reviews of these soybean varieties in June and July of 2015. Those reviews confirmed that these biotech products were safe for use in the EU. The EU, however, has continued to delay approval of these products, without any legitimate basis.

- The EU's delays are impacting American and European farmers. European farmers need U.S. soybeans to feed their livestock. And traders are not entering into contracts for U.S. soybeans due to the EU's failure to approve these products.

- The United States again asks the EU to ensure that its biotech approval measures are consistent with its obligations under the SPS Agreement.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

D. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM (WT/DS404/11/ADD.47)

- The United States provided a status report in this dispute on June 9, 2016, in accordance with Article 21.6 of the DSU.

- As we have noted at past DSB meetings, in February 2012 the U.S. Department of Commerce modified its procedures in a manner that addresses certain findings in this dispute.

- The United States will continue to consult with interested parties regarding matters related to the other recommendations and rulings of the DSB.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

E. UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA: STATUS REPORT BY THE UNITED STATES (WT/DS437/18/ADD.2)

- The United States provided a status report in this dispute on June 9, 2016, in accordance with Article 21.6 of the DSU.
- As detailed in the status report, the United States has taken all necessary actions to bring its measures into compliance with its WTO obligations and has completed its implementation process on May 26, 2016.
- The scope of this dispute was one of the most extensive in the history of the dispute settlement system. Although the panel and Appellate Body rejected many of China's claims, the DSB recommendations and rulings called for further administrative action with respect to 15 separate countervailing duty (CVD) investigations. The DSB recommendations also included one "as such" finding.
- Through extensive efforts, involving multiple CVD proceedings and multiple distinct issues, the United States has completed the implementation process with respect to all findings in the dispute.
- The U.S. implementation in this dispute, as that previously announced for DS436, further demonstrates the commitment of the United States to comply with WTO findings, contributing to strengthening the dispute settlement system.

Second Intervention

- The United States finds China's criticism with respect to the time required for implementation to be unwarranted. The scope of this dispute was one of the most extensive in the history of the dispute settlement system. As we have noted, the DSB recommendations and rulings called for further administrative action with respect to 15 separate CVD investigations. That is, the claims here could have been brought in 15 separate disputes. For most of these separate investigations, the recommendations and rulings involved multiple obligations under the SCM Agreement.

- Through the devotion of administrative resources, the United States was able to implement all of the DSB's rulings with respect to the majority of the CVD proceedings, as well as the one "as such" finding in this dispute, by the end of the RPT.

- Given the tremendous volume of work arising from the extensive scope of this dispute, the remaining proceedings could not be completed by the end of the RPT. But the United States nevertheless completed the remaining determinations within less than two months.

- We regret that China is suggesting that U.S. compliance was inadequate, particularly in light of China's reluctance to provide necessary information during the course of the compliance proceedings. Contrary to China's view, there is no basis for suggesting that U.S. compliance was inadequate.

Third Intervention

- Compliance in this dispute did not involve simply revisiting a single issue in 15 proceedings, but rather required the reconsideration of multiple complex issues in each of the proceedings. Moreover, these issues required Commerce to examine the extent of Chinese government involvement across a range of sectors.

- Commerce's finding pertaining to the use of out-of-country benchmarks provides a clear example of how complex and time-consuming implementation was in this dispute. In response to Commerce's request for information on the input markets in question, China responded with a submission containing more than 1400 pages, including a detailed and lengthy econometric study and more than 80 exhibits. The U.S. domestic industry filed its own competing evidence. Commerce then had to carefully consider all of this evidence in determining how to apply the Appellate Body's findings on this benchmark issue in each of the relevant CVD investigations. This example illustrates just one of the many complex issues that were addressed in these proceedings.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

F. INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS: STATUS REPORT BY INDIA (WT/DS430/15)

- The United States takes note of India's statement in its status report that it "has taken all steps required to comply with the findings and recommendations of the DSB in this dispute."[1]

- The United States is not in a position to accept that assertion.

- We have been unable to verify India's claim that it has promulgated a new draft notification. It had not done so at the time that it circulated its communication claiming compliance.

- Given that India has not notified a final replacement measure to the SPS Committee, we do not see how India could claim to be currently in compliance.

- To the extent India is claiming that the proposed measure it notified to the WTO SPS Committee would bring India into compliance once it enters into force, we have serious concerns – both on substance and procedure.

- Substantively, we note that the proposed measure appears to retain many of the features of India's prior measure that the DSB found to be inconsistent with India's obligations under the SPS Agreement, for example:

- The proposed measure appears to impose import prohibitions on account of avian influenza outbreaks, contrary to the DSB's findings on the OIE Terrestrial Code;[2] and

- The proposed measure appears more trade restrictive than measures based on international guidelines, contrary to the DSB's findings that international standards meet India's level of protection.[3]

[1] WT/DS430/15 (second to last sentence).
[2] *India – Agricultural Products*, para. 7.270.
[3] *India – Agricultural Products (AB)*, para. 5.232.

- Procedurally, the DSB found that India had breached its obligations under Annex B by failing to ensure its existing measure was notified so that amendments could be introduced and comments could be taken into account.[4]

- The notification states the final measure would go into force the day following the close of the period to submit comments. Regrettably, this suggests India did not intend to take into account any comments submitted, nor to leave open the possibility of amending the proposed measure in response to the comments.

- We have asked India for any risk assessment on which its proposed measure is based, but India has not provided any, or even indicated that such a risk assessment exists.

- Moreover, the status report and the notification of the proposed measure omits information as to how India addressed certain other DSB findings, such as the need to ensure its AI measure does not unjustifiably discriminate against imports in light of the conditions prevailing within India.

- The United States does not see how India has addressed the problems found by the DSB with its import restrictions and we will continue to review India's actions and consider how best to address its concerns.

[4] *India – Agricultural Products*, paras. 7.790, 8.1 c. xi.

2. UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENTS BY THE EUROPEAN UNION AND JAPAN

- As the United States has noted at previous DSB meetings, the Deficit Reduction Act – which includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – was enacted into law in February 2006. Accordingly, the United States has taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

- We recall, furthermore, that the EU, Japan, and other Members have acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, over eight years ago.

- We therefore do not understand the purpose for which the EU and Japan have inscribed this item today.

- With respect to comments regarding further status reports in this matter, as we have already explained at previous DSB meetings, the United States fails to see what purpose would be served by further submission of status reports which would repeat, again, that the United States has taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

- Indeed, as these very WTO Members have demonstrated repeatedly when they have been a responding party in a dispute, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented those DSB recommendations and rulings, regardless of whether the complaining party disagrees about compliance.

3. CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. STATEMENT BY THE UNITED STATES

- The DSB adopted its recommendations and rulings in this dispute in August 2012, and the reasonable period of time expired in July 2013.

- As the United States has noted at past meetings of the DSB, China's sole domestic supplier continues to maintain control of the domestic electronic payment services ("EPS") market.

- In accord with its WTO obligations, China must adopt measures necessary and take the required steps to allow the operation of foreign EPS suppliers in China.

- The United States takes note that earlier this month, nearly 4 years after the DSB adopted its recommendations and rulings in this dispute, China issued a regulation that appears to set out a licensing application process for electronic payment service suppliers to obtain authorization to do business in the Chinese market.

- The United States is in the process of reviewing these regulations, with a view to determining whether the regulations will allow for the approval of foreign EPS suppliers without further delays.

4. UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN HOT ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

A. STATEMENT BY INDIA

- As described at the meeting of the DSB on April 22, 2016, the United States completed implementation with respect to the DSB recommendations and rulings in this dispute.
- Specifically, on March 7, 2016, the U.S. International Trade Commission issued a new CVD injury determination rendering the findings with respect to injury in the underlying CVD proceeding on hot-rolled steel from India consistent with the DSB recommendations in this dispute.
- On April 14, 2016, the U.S. Department of Commerce issued a new CVD determination rendering its determination with respect to subsidization and the calculation of countervailing duty rates consistent with the DSB recommendations in this dispute.
- And on April 18, 2016, the U.S. Trade Representative proceeded to complete this implementation process by directing Commerce to implement its new determinations pursuant to section 129(b)(4) of the *Uruguay Round Agreements Act*.
- We do not understand the concern India now raises with respect to a finding on one provision of U.S. law, Section 1677(7)(G)(i)(III) of the Trade Act of 1930.
- As we have explained to India previously, no further U.S. action is needed with respect to this finding.
- The provision of U.S. law at issue was not applied in the underlying investigation, and therefore had no bearing on compliance with respect to the countervailing duty at issue in this dispute.
- Indeed, to our knowledge, this provision of U.S. law has *never* been used in *any* investigation.
- With respect to any future investigations, the statutory provision relates to a decision by the administering authority to *self*-initiate a CVD investigation on the same day as an AD petition is filed by an industry, or vice versa.
- Under U.S. law, Commerce has discretion to decide the timing when it would self-initiate an investigation.

- Having never been triggered before, it is not now the intention of the United States to exercise the discretion on timing provided under U.S. law differently.

- That is, the Department of Commerce has confirmed its commitment to exercise its discretion with respect to section 702(a) of the Tariff Act of 1930 pertaining to countervailing duty investigations and section 732(a) of that Act pertaining to antidumping duty investigations in a manner that is consistent with the international obligations of the United States.

- Given that the United States has fully complied in this dispute, the United States is not required to submit further status reports in this matter.

Second Intervention

- With regard to the other disputes referenced by India, we note the present dispute is differently situated. As we explained at the April DSB meeting and again today, the United States has completed implementation with respect to the DSB recommendations and rulings in this dispute.

5. CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES

A. RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES: REQUEST FOR THE ESTABLISHMENT OF A PANEL (WT/DS427/11 AND WT/DS427/11/CORR.1)

- On September 25, 2013, the DSB adopted its recommendations and rulings in this dispute.

- Members will recall the DSB findings that China's anti-dumping and countervailing duty measures on U.S. broiler products breached a number of China's obligations under the AD and SCM Agreements.

- The United States and China agreed that the reasonable period of time for China to implement the findings would be 9 months and 14 days from the adoption of the panel report, thus expiring on July 9, 2014. On or about that date, China's Ministry of Commerce (MOFCOM) issued a re-determination that continued the imposition of anti-dumping and countervailing duties on imports of U.S. broiler products.

- The United States considers that China has failed to bring its measures into conformity with the covered agreements, and the United States is accordingly seeking recourse to Article 21.5 of the DSU.

- It appears – as detailed in the U.S. Panel Request – that MOFCOM's re-determination is inconsistent with a number of China's obligations under the AD and SCM agreements. For example:

    - MOFCOM's analysis of the alleged price effects of imports under investigation and the findings of adverse impact by imports on the domestic industry did not involve an objective examination of the record and was not based on positive evidence;

    - MOFCOM's determination that subject imports were causing injury to the domestic industry was not based on an examination of all relevant evidence, including that subject import volume did not increase at the expense of the domestic industry and that a large portion of subject imports consisted of products that could not have been injurious, and was based on MOFCOM's flawed price and impact analyses;

- MOFCOM did not provide interested parties timely opportunities to see all non-confidential information or provide notice of the information it required;

- MOFCOM failed to inform interested parties of the essential facts under consideration which formed its basis to apply anti-dumping and countervailing duties;

- MOFCOM failed to set forth sufficient detail in its findings and conclusions on material issues of law and fact; and

- MOFCOM failed to properly calculate the purported anti-dumping margins for U.S. producers and exporters by acting inconsistently with a number of obligations, including those relating to the cost of production methodologies it employed, the use of facts available, and the calculation of rates for producers not under examination.

- Many of these issues have been raised in prior WTO disputes concerning the use of trade remedy measures by China – and found to be inconsistent with China's obligations.

- For these reasons, the United States seeks recourse to Article 21.5 of the DSU and requests that the DSB refer the matter set out in the U.S. panel request to the original panel, wherever possible. Pursuant to the agreement on procedures between China and the United States, China will not object to referral to the original panel at today's meeting.

6. UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

A. SECOND RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO: REQUEST FOR THE ESTABLISHMENT OF A PANEL (WT/DS381/38)

- Mr. Chairman, the United States does not object to Mexico's panel request. Indeed, our only wish is that Mexico had requested this panel several months ago.

- As we have now discussed several times, the United States has amended the U.S. dolphin safe labeling measure is manner that directly addresses the DSB's recommendations and rulings, and brings the United States into compliance with its WTO obligations.

- The United States discussed the rule with Mexico on a number of occasions and expected that, if Mexico disagreed that the measure brought the United States into compliance, Mexico would refer the matter to a compliance panel.

- However, for several months, Mexico indicated that it was not prepared to refer the matter of compliance back to a compliance panel.

- To the contrary, Mexico insisted that the arbitration under Article 22.6 of the DSU to review Mexico's request for authorization to suspend concessions must move forward immediately and at the DSB meeting on March 23 said that it considered that the U.S. compliance action was not "legally pertinent" for the arbitration.

- In short, Mexico has sought to avoid the fact that the United States has now changed its measure to come into compliance with its WTO obligations and instead proceed as though the measure at issue were unchanged.

- As a result, in April, the United States took the unusual step of requesting that the DSB establish a compliance panel pursuant to Article 21.5 of the DSU to confirm that the United States has brought its measure into compliance with the DSB's recommendations and rulings. That panel was established at the DSB meeting on May 9.

- As we have consistently stated, the United States desires to bring this dispute to a close as soon as possible and surely does not seek further delay. We therefore look forward to

moving forward promptly with the compliance review pursuant to Article 21.5 and to more cooperation on procedural matters going forward.

- To be clear, most Mexican tuna is not eligible for the dolphin-safe label because of the manner in which most Mexican vessels have chosen to fish for tuna. The fleets of other nations have abandoned the practice, but those Mexican vessels have chosen to employ a method of fishing – setting on dolphins – that is recognized to pose a particular risk to dolphins.

- Mexico's preferred fishing method involves deliberately chasing dolphins and capturing them. In so doing, it may result in dolphins being killed or seriously injured, separating dolphin calves from their mothers, reducing reproduction rates, and other harms. Simply put, tuna caught using this damaging fishing method is clearly not "dolphin safe," and it would be misleading to consumers to claim that it is.

- As such, denying eligibility to the "dolphin safe" label to tuna product produced in a manner that by its very nature is harmful to dolphins is not discriminatory and is not inconsistent with the WTO Agreement.

8. UNITED STATES –COUNTERVAILING MEASURES ON CERTAIN SUPERCALENDERED PAPER FROM CANADA

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CANADA (WT/DS505/2)

- We are disappointed that Canada has chosen to request the establishment of a panel with regard to this matter.
- The underlying trade issue here is that Canada has decided to provide massive subsidies to a new Canadian paper factory that clearly was established for the purpose of selling into the U.S. market. These subsidies and the resulting low-priced exports have harmed U.S. workers and companies.
- For more than two years, the United States has asked Canada to address the harm caused by Canadian subsidies, but Canada has refused. It is ironic now for Canada to invoke WTO dispute settlement to challenge a legitimate U.S. response to the trade problem caused by Canada's own policy choices.
- Further, without prejudice to whether each item in Canada's panel request is a measure, the United States has explained to Canada that the measures identified in Canada's request are fully consistent with U.S. obligations under the WTO Agreement.
- For these reasons, the United States is not in a position to agree to the establishment of a panel today.

10. PRACTICES AND PROCEDURES IN THE CONDUCT OF WTO DISPUTES

A. STATEMENT BY CANADA

- We thank Canada for providing copies of its proposals and for being willing to work with Members.

- We have some questions and are still reviewing these documents.

11. STATEMENT BY THE CHAIRMAN REGARDING THE CONSULTATIONS ON APPELLATE BODY MATTERS

- The United States thanks you, Mr. Chairman, for your continued work in carrying out consultations on these matters.

- In response to the apparent suggestion that the United States reconsider its position and support reappointment of Mr. Chang to a second term on the Appellate Body, the U.S. position is clear and will not change.

- For several years, the United States has been raising with Members its systemic concerns with the operation of the WTO dispute settlement system, and in particular with the adjudicative approach of certain Appellate Body reports.

- We have also noted that these concerns are widely shared in the United States. For example, the recent letter from six former U.S. Trade Representatives reinforces those concerns.

- And the United States has explained in detail how those concerns informed its decision regarding the reappointment of Mr. Chang. Rather than repeat that explanation today, we would refer Members to the U.S. statement at the May 23, 2016, meeting of the WTO Dispute Settlement Body.

- The United States would recall, however, the question we posed to WTO Members at that meeting: if a candidate for appointment to the Appellate Body were to say openly that he or she would issue Appellate Body reports reflecting the systemic concerns we identified, would your government support that candidate for appointment?

- We would think most WTO Members would say no. And a candidate not suitable for appointment is no more suitable for reappointment.

- We continue to appreciate the engagement we have had with delegations and look forward to engaging with all Members on the critical issues of how to reinforce the aim and proper adjudicative approach of the dispute settlement system.

- At this same time, however, we consider the DSB should continue to work to find a consensus on the appointment of persons to fill the two current vacancies on the Appellate Body.